No. 93-392

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TROOPER THOMAS GARDNER,

Petitioner,

v.

RICHARD REED, individually, as administrator of the decedent's estate of Pamela Jo Reed and as guardian of the estates of Angela Reed and Marilyn Reed; CHIEF HERMAN A. DAVIDSON; CITY OF MARTINSVILLE; DEPUTY SHERIFF JAMES F. BENDER; CLARK COUNTY, ILLINOIS; DEPUTY SHERIFF JACK RAGSDALE; and JASPER COUNTY, ILLINOIS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a police officer violate the due process rights of victims of private car accidents because he arrests an allegedly sober driver and abandons the car to a drunk passenger who then drives the car and eventually causes the accident?

LIST OF PARTIES

In the Seventh Circuit, the appellants were: Richard Reed, individually, as administrator of the decedents' estates of Pamela Jo Reed and Jason Wesley Reed and as guardian of the estates of Angela Reed and Marilyn Reed; Marilyn Kuykendall and Roy Kuykendall. Richard Reed, in his capacity as administrator of the decedent's estate of Jason Wesley Reed, and the Kuykendalls are not respondents in this Court because their claims are immaterial to this petition for certiorari. *See infra* p. 8 n.3. The appellees in the Seventh Circuit were: Illinois State Trooper Thomas Gardner; Chief Herman A. Davidson of the Martinsville, Illinois, Police Department; the City of Martinsville; Deputy Sheriff James F. Bender of Clark County, Illinois; Clark County, Illinois; Deputy Sheriff Jack Ragsdale of Jasper County, Illinois; and Jasper County, Illinois. (App. 19-20).

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Illinois State Trooper Thomas Gardner, respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on February 23, 1993.

OPINIONS BELOW

The United States District Court for the Southern District of Illinois entered an unpublished memorandum and order on July 10, 1991. (App. 21). The United States Court

of Appeals for the Seventh Circuit entered its opinion and judgment on February 23, 1993. The appellate court's opinion is published at 986 F.2d 1122. (App. 1). The appellate court denied Gardner's petition for rehearing with a suggestion for rehearing en banc in an unpublished order on June 8, 1993. (App. 17).

JURISDICTION

The United States Court of Appeals entered its judgment on February 23, 1993. (App. 15-16). On March 10, 1993, the appellate court granted Gardner's motion for an extension of time to file a petition for rehearing to and including March 30, 1993. Gardner filed a timely petition for rehearing with a suggestion for rehearing en banc, and the appellate court denied this petition on June 8, 1993. (App. 17-18). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

STATEMENT OF THE CASE

I. The Events Leading to Rice's Car Crash With the Reeds

Larry Rice had been drinking at the Orchard Inn, Inc., on the morning of September 11, 1988. (App. 48). After leaving the Orchard Inn, he was a passenger in Cathy Irby's car in Clark County, Illinois, when State Trooper Thomas Gardner, Chief Herman A. Davidson of the Martinsville Police Department and Deputy Sheriff James F. Bender of Clark County arrested Irby. (App. 51). The officers left Rice in the car with Irby's keys. (App. 51).

Two hours passed. (App. 51). Rice, while drunk, was driving Irby's car south on Route 130 in Jasper County, Illinois. (App. 40). Deputy Sheriff Jack Ragsdale of Jasper County was pursuing Rice at over ninety miles per hour in his unmarked car without sounding a siren, operating adequate flasher lights or otherwise giving adequate warning to oncoming traffic. (App. 59). Plaintiff Richard Reed, his wife, Pamela Jo Reed, and their two daughters, Marilyn and Angela Reed, were riding north in their car on Route 130 at the same time. (App. 40, 50). Pamela Jo Reed was pregnant. (App. 41). Marilyn and Roy Kuykendall were riding in the Reeds' car as well. (App. 45-46). Rice crossed the center line and crashed into the Reeds' car. (App. 50). The Reeds and the Kuykendalls all suffered injuries or died from the accident. (App. 51-52).

II. The Lawsuit

Richard Reed (appearing individually, as guardian of the estates of Angela Reed and Marilyn Reed and as administrator of the decedents' estates of Pamela Jo Reed and the fetus she was carrying, Jason Wesley Reed) and the Kuykendalls sued Larry Rice, Cathy Irby, Orchard Inn,

Inc., all four police officers and the governmental entities employing the officers in a thirteen-count amended complaint.[1]

Eleven of the thirteen counts assert claims under state law for either negligence or willful and wanton conduct. Count 10, however, claims that Officers Gardner, Davidson and Bender, all of whom allegedly arrested Irby and left the car keys with Rice, violated the plaintiffs' civil rights under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 by "entrusting the car to Rice, when they knew or should have known that Rice was intoxicated, that Rice would drive the car, and that when Rice drove the car, injury was likely to result." (App. 51). Count 8 asserts precisely the same claim against Irby, although under the state law of negligent entrustment:

> Approximately two hours before the crash, defendant Cathy Irby, along with defendants Gardner, Davidson and Bender, as alleged in Counts X and XI, negligently entrusted her car to defendant Larry Rice when she knew or should have known that Rice was intoxicated, that he would drive the car, and that when he drove the car, injury was likely to result.

(App. 46).

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[1] The amended complaint does not state whether the plaintiffs sued Gardner in his official or individual capacity. (App. 38). The Seventh Circuit evidently construed the amended complaint to be against Gardner in his personal capacity, so the Eleventh Amendment presented no bar to federal jurisdiction. *Hafer v. Melo*, 112 S. Ct. 358, 365 (1991) (Eleventh Amendment does not bar suits for damages against state officials sued in their individual capacities). The district court had original jurisdiction over the civil rights claims against Gardner, which are the only claims at issue in this petition for certiorari, under 28 U.S.C. §§ 1331 and 1343(a)(3) (1988) because the plaintiffs sued under 42 U.S.C. § 1983 (1988) and the Due Process Clause of the Fourteenth Amendment.

Gardner moved to dismiss the counts against him. With regard to the section 1983 claim, Gardner argued that this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), precluded his liability because, under *DeShaney*, state actors have no obligation to protect individuals against private violence. (App. 28-29). Gardner argued that Rice injured the Reeds and the Kuykendalls by crashing into their car and that Gardner had no constitutional obligation to protect them from such private violence.

The plaintiffs attempted to distinguish *DeShaney* by arguing that Gardner affirmatively created the danger to the plaintiffs by entrusting the car to Rice. (App. 29). The district court rejected this characterization of the allegations in the amended complaint. The court noted that "[t]he allegations are stated in positive terms—'They left defendant Larry Rice inside Irby's car with Irby's keys, thereby entrusting the car to Rice'—but the thrust of this allegation is that the defendants failed to prevent Rice from taking control over the vehicle." (App. 29).

The district court nonetheless appeared to accept the plaintiffs' description of *DeShaney*'s holding. The court suggested that if the plaintiffs had alleged that the arresting officers had taken "a safe situation and turned it into a dangerous situation by arresting Irby," then they would have stated a claim despite *DeShaney*. (App. 30). The court explained that the amended complaint failed under this rule because Irby herself was drunk. Thus, "[a]t best, the amended complaint alleges that the officers, after removing one intoxicated driver from the road, failed to take steps to prevent a second intoxicated person from taking the wheel." (App. 30). For this reason, the court held that the plaintiffs failed to state a claim. (App. 30-31). The court also dismissed the civil rights claims on the

fetus' behalf because fetuses have no rights under the Due Process Clause. (App. 32).

III. The Plaintiffs' Appeal to the Seventh Circuit

The Seventh Circuit affirmed in part and reversed in part in a split decision. The majority reversed the district court's analysis of *DeShaney* and held that the amended complaint stated a claim under section 1983. The majority began by holding that the district court had gone outside the pleadings by declaring that Irby herself was drunk. (App. 3). The court stated that it could only reasonably read the amended complaint to allege that Irby was sober.[2] (App. 3-4). Given this reading of the amended complaint, the majority considered the issue on appeal to be "whether injured parties can state a claim under section 1983 when police officers arrest a sober driver and leave behind an obviously drunk passenger who takes the wheel." (App. 4). The majority considered this to be "an indisputably close question." (App. 9).

The majority noted that "*DeShaney*'s emphasis on the state's obligation under the Due Process Clause to those in its custody seems at first to prevent plaintiffs from proceeding under section 1983." (App. 4). The majority conceded that Gardner never took the Reeds or even Rice

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[2] The court of appeals knew that this reading of the amended complaint was false as a factual matter. As the court explained, at least one defendant brought Irby's intoxication to the district court's attention and the appellants admitted in their appellate brief that Irby was arrested for drunken driving. (App. 3). Indeed, the court remanded the case only for a perfunctory summary judgment proceeding: "Our holding makes it clear that the Reeds face an insurmountable hurdle on summary judgment. . . . [T]he evidence of Irby's intoxication supports a finding of summary judgment on the claim for civil rights violations." (App. 6).

into custody and that the Reeds had never even encountered Gardner or the other arresting officers. (App. 4-5). Nonetheless, the majority (like the district court), citing two sentences from *DeShaney*, stated that *DeShaney* "leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger." (App. 5). Thus, despite *DeShaney*'s holding that the Due Process Clause imposes no obligation on state officials to protect the general public, the majority held that police officers "may be subject to suit under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger." (App. 9).

In reaching this conclusion, the majority readily acknowledged that the arresting officers did not promote or encourage Rice's conduct. It expressly rejected any inference that "the police handed the keys to Rice, left the car running, or encouraged Rice to drive himself home." (App. 5 n.1). Similarly, the majority recognized that the police did not buy Rice drinks or provide him with a car. (App. 9). Rather, the officers' section 1983 liability rested solely on "the police action in removing Irby, combined with their knowledge of Rice's intoxication . . . ." (App. 6). According to the majority, "[p]olice officers who remove sober drivers and leave behind drunk passengers with keys may be said to create a danger or at least render others on the road more vulnerable." (App. 5).

Further, the majority concluded that the complete lack of direct contact between the arresting officers and the plaintiffs and the two-hour time lapse between Irby's arrest and the accident did not preclude liability. In its view, "[t]he dangers presented by drunk drivers are familiar and specific; in addition, the immediate threat of harm

has a limited duration." (App. 8-9). Since the police created a "specific danger," the majority reasoned that they "need not know who in particular will be hurt" for section 1983 liability to attach. (App. 9). Rather, they "can be held accountable by any injured party." (App. 9). Likewise, the majority found that the two-hour time lapse and the distance between the arrest and the accident were "not sufficiently attenuated to relieve the defendants of section 1983 liability." (App. 9). Accordingly, the majority reversed the district court's dismissal with respect to the claim against defendant Gardner.

Judge Richard A. Posner dissented in part[3] and refused to join the majority's holding on the due process issue. (App. 12). He stated that "an affirmance could be defended," but he refused to address the merits of this "difficult constitutional question" because he felt that the Reeds' concessions on appeal regarding Irby's intoxication made resolution of the question unnecessary. (App. 12-14). Therefore, he would have remanded the case with directions to conduct a summary judgment proceeding. (App. 14).

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[3] Judge Posner concurred with the majority's holdings that the fetus had no cause of action under the Fourteenth Amendment and that the court lacked appellate jurisdiction over the Kuykendalls' claims under Federal Rule of Appellate Procedure 4(a)(5). (App. 10-12). Because the court affirmed the district court's judgment with respect to the fetus' claims and because the Kuykendalls never properly appealed from the district court, the claims of the fetus and the Kuykendalls are immaterial to this petition for certiorari, and these parties are not respondents in this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES* AND, DESPITE THIS COURT'S REPEATED ADMONITIONS, INVITES FURTHER EXPANSION OF POLICE OFFICERS' LIABILITY UNDER THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE.

As the Seventh Circuit fully recognized, Gardner never specifically intended to harm the Reeds in any way; indeed, he never even met them. In fact, the amended complaint does not even permit an inference that Gardner intended to harm *anyone* in particular. Yet, the court of appeals held that Gardner violated the Reeds' substantive due process rights when they sustained injuries at the hands of a private actor.

This ruling subverts the holding of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). By recognizing a duty under the Due Process Clause where no direct contact exists between the police officer and the section 1983 plaintiff, the court of appeals transgressed *DeShaney*'s core principle. The court imposed a constitutional duty upon police officers to protect the public from private acts of violence without *any* tangible link between section 1983 plaintiffs and the officer allegedly responsible for the deprivation of liberty.

This Court has repeatedly admonished that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). The Court has "previously rejected claims that the Due Process Clause should be interpreted to impose

federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1070 (1992). "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Creating liability under the Due Process Clause in this context, where the Reeds' claim against Gardner amounted to nothing more than a run-of-the-mill negligence claim, is directly contrary to these fundamental constitutional limits.

The decision is all the more erroneous in this respect. Many state courts would *dismiss* negligent entrustment claims against police officers like this one for failure to state a claim under the common law "public duty" doctrine. *See, e.g., Jackson v. City of Wentzville*, 844 S.W.2d 585, 587-89 (Mo. Ct. App. 1993) (plaintiff had no negligent entrustment claim against police officers for a drunk driving accident because "any duty held by a police officer to prevent an intoxicated person from driving while intoxicated is a duty owed to the general public"). *See generally* James L. Isham, Annotation, *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer*, 48 A.L.R. 4th 320 § 2[a], at 325 (1986) (clear majority of courts refuse to impose liability on police officers for failing to restrain drunk drivers because any duty was owed only to the general public). The Seventh Circuit thus found a cause of action under the substantive component of the Due Process Clause for allegations that would not even support a negligence suit under most state common law.

Furthermore, the decision adds to the difficulty of making myriad judgment calls routinely required of police of-

ficers. Had Trooper Gardner restrained Rice's movement in this case by removing him from the scene or by leaving him in the car without keys, the trooper likely would have been forced to defend against other section 1983 actions. *See, e.g., Fields v. City of South Houston*, 922 F.2d 1183 (5th Cir. 1991) (false arrest); *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir.), *cert. denied*, 112 S. Ct. 656 (1991) (passenger injured by third party after police arrested driver, impounded car because passenger was too drunk to drive and left passenger in high crime area); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (passenger injured by third party after police arrested driver and left passenger in car in high crime area); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (children injured by police action of abandoning them on highway after uncle was arrested). This result offers police officers the Hobson's choice that this Court foresaw in *DeShaney*: state officials will face liability for whatever course they follow. 489 U.S. at 203. This Court should grant the writ of certiorari to curtail the Seventh Circuit's erroneous expansion of due process principles.

II.

THE SEVENTH CIRCUIT'S DECISION, VIEWED WITH OTHER STATE AND FEDERAL COURTS' VARIED APPLICATIONS OF SUBSTANTIVE DUE PROCESS PRINCIPLES, GRAPHICALLY DEMONSTRATES THE NEED FOR THIS COURT'S FURTHER GUIDANCE.

Almost ten years ago, Justice White argued that the Court should grant certiorari in a case because of "the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort." *Jackson v. City of Joliet*, 465 U.S. 1049, 1051

(1984) (White, J., joined by Rehnquist, J., dissenting from the denial of certiorari). Although the Court has, since then, attempted to address Justice White's concerns, the majority opinion below violates the principles of each of those later cases. The Seventh Circuit's decision thus illustrates well that, despite this Court's efforts to clarify the law, the scope of a "constitutional tort" under the substantive component of the Due Process Clause remains just as " 'perplexing' " for the lower courts today as it was ten years ago. *Id.*

Since *Jackson*, this Court has limited liability in this context in two ways. First, applying the tort-law concept of duty, the Court held in *DeShaney* that state actors have no due process obligation to protect members of the general public from private violence. 489 U.S. at 195-203. The Court strongly reaffirmed *DeShaney* in *Collins*, holding that even the government's deliberate indifference to its own employees' safety did not violate due process. 112 S. Ct. at 1070. Furthermore, the Court has imposed a state-of-mind requirement for due process claims, holding that merely negligent conduct does not violate due process. *Daniels*, 474 U.S. at 330-33; *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986).

The Seventh Circuit's judgment below is inconsistent with each of these cases and reflects only one of many approaches by the lower courts in grappling with this exceedingly difficult constitutional issue. According to the majority below, due process violations turn on who creates the danger to the public. When the police, by some "affirmative act," make any member of the general public more vulnerable to a foreseeable danger and someone among the public is then injured by that danger, the police have violated that person's due process rights. On the other hand, if the affirmative acts of the police did not

create the danger in the first place, then the police action of failing to prevent the injury cannot trigger due process liability. (App. 5-10).

The confusion over "affirmative act" liability comes from the lower courts' attempts to apply this Court's opinion in *DeShaney*. Two passages from *DeShaney* have caused serious confusion in the lower courts. The Court first stated:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200 (footnote omitted). The "harms Joshua suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor." *Id.* at 201 (footnote omitted). For this reason, Joshua failed to state a substantive due process claim.

The Court then appeared to qualify this language by suggesting that the state actor's creation of a danger for the plaintiff might constitute a restraint of "liberty" under the Due Process Clause even if the state had *never* incarcerated the plaintiff:

> While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him more vulnerable to them.* That the State once took custody of Joshua does not alter the analysis, for when it returned him to his father's custody, *it placed him in no worse position than that in which he would have been had it not acted at all*; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

489 U.S. at 201 (emphasis added). Courts have issued markedly inconsistent opinions in applying these two passages, holding either that (1) some sort of physical restraint must precede the state actor's wrongful conduct or (2) any state action that makes the public more vulnerable to danger violates due process regardless of any earlier physical restraint.

Many courts, unlike the Seventh Circuit below, have held or strongly suggested that the State must first physically incarcerate or restrain the plaintiff to oblige the State to protect him against violence committed by third parties. As the Supreme Judicial Court of Massachusetts held, "Under the United States Constitution, the State has no affirmative duty to provide services absent custody." *Williams v. Secretary of the Executive Office of Human Services*, 609 N.E.2d 447, 457 (Mass. 1993).[4] Jus-

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[4] *Accord Doyle v. Oklahoma Bar Ass'n*, 1993 U.S. App. LEXIS 18064, at *23-24 (10th Cir. July 19, 1993) ("Substantive due process does not encompass a right to compel a state to do something for someone not under some form of custody or restraint . . . ."); *Harris v. District of Columbia*, 932 F.2d 10, 14-15 (D.C. Cir. 1991) (plaintiff had no cause of action against police who responded to plaintiff's emergency medical call because plaintiff had voluntarily called the ambulance); *Wright v. Bailey*, 611 So. 2d 300, 303-306 (Ala. 1992) (failure to arrest drunk driver creates no liability because no custodial relationship exists between officer and victim); *W.L.O. v. Smith*, 585 So. 2d 22, 25 (Ala. 1991) (custodial relationship needed); *Moore v. City of Lewiston*, 596 A.2d 612, 616-17 (Me. 1991) (police not liable to passenger who was victim of crime after police arrested drunk driver because passenger was never in custody); *Ashby v. City of Louisville*, 841 S.W.2d 184, 190 (Ky. Ct. App. 1992) (no due process violation "unless it is shown, in a given situation, that the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor"); *Cleveland v. Fulton County*, 396 S.E.2d 2, 3 (Ga. App. Ct. 1990) (requiring custody or control of the State to impose liability), *cert. denied*, 1990 Ga. LEXIS 640 (Ga. Sept. 4, 1990); *Henke v. Superior Court of Arizona*, 775 P.2d 1160, 1165 (Ariz. Ct. App. 1989) (requiring custody).

tice Brennan's dissent in *DeShaney* itself supports this description of *DeShaney*'s holding. 489 U.S. at 206 (Brennan, J., dissenting) ("to the Court, the only fact that seems to count as an 'affirmative act of restraining the individual's freedom to act on his own behalf' is direct physical control").

Collins v. City of Harker Heights also supports this reading of *DeShaney*. In that case, a city sewer worker sued his employer, alleging that the city was deliberately indifferent to his safety by failing to warn him about dangers in the work place. 112 S. Ct. at 1064-65. This Court held that the plaintiff failed to state a claim, in part, because the city had not incarcerated the plaintiff. *Id.* at 1069 (plaintiff's claim "is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty"). Because the city had not physically restrained the plaintiff, the Court considered the plaintiff's claim to be "analogous to a fairly typical state law tort claim" and held that, as such, it did not implicate the Due Process Clause. *Id.* at 1070. If the government's deliberate indifference to the safety of a nonincarcerated person did not violate due process in *Collins*, it should not violate due process in this case either. *See Fagan v. City of Vineland*, 1993 U.S. App. LEXIS 20327, at *78-79 (3d Cir. Aug. 5, 1993) (Sloviter, J., dissenting) (after *Collins*, "the reckless indifference of government employees is an insufficient basis upon which to ground their liability for [wrongful police action] under the Due Process Clause. Such an inquiry is grounded in tort law, not in constitutional principles") (footnotes omitted).

Many other courts have held that, while actual incarceration is not necessary, *DeShaney* still requires at least

a preexisting relationship between the plaintiff and defendant that is sufficiently analogous to physical custody to distinguish the plaintiff from members of the general public.[5] Most significantly, these courts explicitly considered and rejected the creation-of-a-danger analysis that the Seventh Circuit applied below in its attempt to distinguish *DeShaney*.

In *Nobles v. Brown*, for example, the Sixth Circuit found no due process violation when a prison guard sued prison officials under section 1983 after she was taken hostage and raped by prisoners. 985 F.2d at 235-36. The Sixth Circuit conceded that *DeShaney* was factually distinguishable because in *Nobles*, unlike *DeShaney*, the defendants allegedly made the plaintiff more vulnerable to danger:

> Although the logic of *DeShaney* clearly governs the instant case, in our view, there are some obvious factual distinctions between that case and this one. While the State of Wisconsin was aware of the dangers faced by the child in *DeShaney*, for example, "it played no part in their creation. . . ." In the case at bar, by contrast, the defendant officials are charged with having played a part in creating the dangers faced by the plaintiff.

985 F.2d at 237 (citation to *DeShaney* omitted). Thus, even though prison guards "played a part in creating the danger," *id.*, the Sixth Circuit held that *DeShaney* precluded liability.

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[5] *Monahan v. Dorchester County Counseling Center, Inc.*, 961 F.2d 987, 990-94 (1st Cir. 1992); *Weller v. Department of Social Services for the City of Baltimore*, 901 F.2d 387, 392 (4th Cir. 1990); *de Jesus Benavides v. Santos*, 883 F.2d 385, 388 (5th Cir. 1989); *Nobles v. Brown*, 985 F.2d 235, 237-38 (6th Cir. 1992); *Garcia v. Superior Ct. of Santa Clara County*, 789 P.2d 960, 967 (Cal. 1990); *Allen v. Anderson*, 490 N.W.2d 848, 852-54 (Iowa Ct. App. 1992).

Nobles directly conflicts with the Seventh Circuit's decision below. According to the Seventh Circuit's reasoning, a state actor owes a duty when he adds to a danger, including a danger not directed at any particular person and including a danger not directed at a person with a preexisting relationship with the state actor. The Sixth Circuit, in contrast, narrowly limits substantive due process claims. As that court most recently explained: " 'The proper analysis is whether *a special relationship exists* . . . between the victim and the state or whether there is some showing that the victim, *as distinguished from the public at large*, faces a danger [from the private actor].' " *Jones v. City of Carlisle*, 1993 U.S. App. LEXIS 21666, at *8-9 (6th Cir. Aug. 27, 1993) (emphasis added) (quoting *Janan v. Trammell*, 785 F.2d 557, 560 (6th Cir. 1986)). Indeed, in *Nobles*, the court suggested that "clothing [a private actor] with the authority of the state" may be a predicate to such section 1983 claims. 985 F.2d at 238 n.1.[6]

The First Circuit also rejected the Seventh Circuit's approach to substantive due process in *Monahan*. In that case, even though the defendant's act "could plausibly be said to have rendered [the plaintiff] more vulnerable to danger," such an act is "not the kind of 'affirmative act' on the part of the state which would give rise to a *constitutional* rather than a tort duty to protect." 961 F.2d

[6] *Nobles v. Brown* is also noteworthy in that it questions whether *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (en banc), a leading pre-*DeShaney* decision upon which the majority relied below (App. 8), remains good law after *DeShaney*. *Nobles*, 985 F.2d at 238 n.1. Significantly, Sixth Circuit Judges David A. Nelson and Danny J. Boggs, who both joined the en banc majority in *Nishiyama*, were on the *Nobles* Sixth Circuit panel that expressed these reservations about *Nishiyama*. The Seventh Circuit thus relied on a case that may no longer be good law in the circuit that decided it.

at 993. Even if the state "played some causal role in the harm, it did so only because Monahan voluntarily availed himself of a [State] service." *Id.* Applying this same reasoning, many courts have rejected substantive due process claims against police officers for failing to restrain drunk drivers.[7] Similarly, courts have also found no cause of action when the plaintiff is only a member of the general public who had no preexisting relationship with the state defendant.[8]

Some courts, however, like the Seventh Circuit below, have held that any creation of a danger by a state actor creates a due process duty even if the state had not restrained the plaintiff in any way. For example, the Ninth Circuit reached the opposite result of both the Fifth Circuit in *de Jesus Benavides* and the Sixth Circuit in *Nobles* in holding that a prison nurse who was raped by prisoners could sue prison officials. *L.W. v. Grubbs*, 974 F.2d 119, 121-23 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2442 (1993). The *L.W.* court, like the Seventh Circuit below, reasoned that "*DeShaney* did not rule that custody was required where the state affirmatively causes the harm." 974 F.2d at 121. The Tenth Circuit applied similar reasoning in a police chase case. In *Medina v. City and County of Den-*

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[7] *California First Bank v. New Mexico*, 801 P.2d 646, 657 (N.M. 1990); *Wright v. Bailey*, 611 So. 2d at 303-306; *Moore v. City of Lewiston*, 596 A.2d at 616-17; *Estate of Kelly v. City of Grosse Pointe Park*, 448 N.W.2d 352, 357 (Mich. App. Ct. 1989), *application denied*, 463 N.W.2d 708 (Mich. 1990).

[8] *Marshall v. Winston*, 389 S.E.2d 902, 905 (Va. 1990); *Engstrom v. Iowa*, 461 N.W.2d 309, 319 (Iowa 1990); *Vigil v. Martinez*, 832 P.2d 405, 406 (N.M. Ct. App. 1992); *Duong v. County of Arapahoe*, 837 P.2d 226, 229 (Colo. Ct. App.), *cert. denied*, 1992 Colo. LEXIS 983 (Colo. Oct. 13, 1992); *Hayes v. City of Chicago*, 595 N.E.2d 144, 148 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 452 (Ill. 1992).

ver, 960 F.2d 1493 (10th Cir. 1992), a bicyclist who was injured by a fleeing felon's car sued the police officers who were pursuing the felon. Even though the officers had no preexisting relationship whatsoever with the plaintiff, the court found liability. *Id.* at 1496.[9]

All these cases were decided after *DeShaney* and illustrate the difficulty that courts have had in applying the decision. This Court should grant certiorari to resolve these conflicts and clarify this important constitutional question.

CONCLUSION

The majority decision below violates this Court's reasoning in *DeShaney* by permitting members of the general

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[9] *See also Fagan v. City of Vineland*, 1993 U.S. App. LEXIS 20327, at *34-44 (police officer can be liable to innocent bystanders whose car was struck by car attempting to evade police officer because police acted recklessly); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (protester could sue police after being beaten by skinheads because police allegedly "assisted in creating or increasing the danger to the victim"); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1370, 1373-76 (3d Cir. 1992) (en banc) (acknowledging that *DeShaney* primarily requires "physical custody," but still analyzing whether the defendants made the plaintiffs more vulnerable to harm), *cert. denied*, 113 S. Ct. 1045 (1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) (analyzing whether police created danger that passengers in car would drive away and get in accident when police arrested driver), *cert. denied*, 113 S. Ct. 1265 (1993); *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992) (analyzing whether a sheriff created the danger that a hostage would be killed by her captor); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 355-59 (11th Cir. 1989) (town clerk could sue town for permitting prisoners to do community work near her office and failing to prevent two prisoners from abducting her), *cert. denied*, 494 U.S. 1066 (1990); *Culver-Union Township Ambulance Serv. v. Steindler*, 611 N.E.2d 698, 703 (Ind. Ct. App. 1993) (plaintiff could sue township for inadequate ambulance service policy).

public to sue a police officer based solely on an allegation that he did his job poorly. Some federal circuits have applied similar analyses since *DeShaney* while some state courts and other federal circuits have not. Given the gravity of the issue presented and this large split of authority, this Court should grant certiorari.

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